United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-1356

To be argued by
SHEILA GINSBERG

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

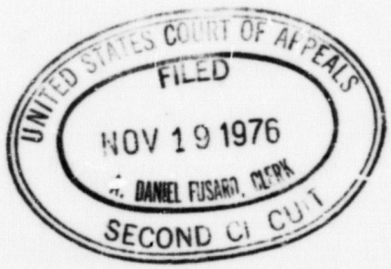
MARIO CAICEDO,

Defendant-Appellant.

Docket No. 76-1356

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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Since the filing of appellant's main briefs, this Court (Meskill, C.J.) decided United States v. Robinson, Doc. No. 76-1177, slip op. 333 (October 29, 1976), which reversed a conviction because the trial judge excluded, as did Judge Costantino here, evidence probative of the alibi defense. The instant appeal presents a stronger case for reversal than did Robinson. There, to counter accomplice testimony as well as eyewitness identification, the defense, in support of its alibi, sought to introduce the opinion testimony that the

surveillance photograph of the robber looked like another person not the defendant. In this case, the defense sought to introduce evidence in the files of the United States Bureau of Immigration and Naturalization (INS) that was both corroborative and independent proof of the alibi that appellant, having been deported in August 1973, was not in the country at the time of the crime. To counter the two-year-old eyewitness identifications in this case, appellant was entitled to have the jury evaluate Ms. McAllen's testimony, corroborated by the documents in the INS file, that appellant could not have been in Brooklyn for the April 1974 drug transaction.

The Government, without citation to United States v. Robinson, supra, or, for that matter, to any other case authority, contends that Judge Costantino was correct in excluding this evidence because (1) defense counsel failed to identify "with particularity" the relevant documents; (2) explanatory testimony by an INS official was essential to establish relevance; (3) absent the witness who made the document entries, the evidence was not trustworthy; and (3) counsel did not object to Judge Costantino's limiting instructions which, although concededly "inartful," did not nullify the effect of the one document admitted. These arguments are, at best, disingenuous, and require only brief responses, which follow seriatim:

1. Defense counsel's failure to focus on the particularly relevant items in the INS file was the direct result

of the prosecutor's denial of access to the file until just minutes before the defense was to be presented. While certain documents from the file had indeed been turned over prior to trial, all but one of the relevant documents were not given to counsel. The deportation case check sheet (Appendix D-1) the memorandum concerning cancellation of the bond (Appendix D-2), the notice of cancellation (Appendix D-3), and the new immigration bond (Appendix D-5) were not previously disclosed.* In contrast to trial counsel's hurried review of the file in the courtroom, the prosecutor had exclusive possession of the file long prior to trial, and the trial judge perused the file at length in camera and then spoke to the prosecutor about it (Transcript dated January 16, 1976, at 3-9).

Consequently, the judge and prosecutor were in a position to perceive the significance of certain documents, whereas defense counsel was not. Appellant should not be penalized because his lawyer was denied adequate time to cull from the file and identify for the court specific documents that supported appellant's contention that he had been deported. In view of both the prosecutor's and the trial court's independent and careful analysis of the file, counsel's generalized motion to introduce the relevant documents from the file was sufficient.

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*The prosecutor's recital of all the INS documents he disclosed prior to trial establishes that only the "Request for Immigration" (Appendix D-4) was included (Transcript dated January 15, 1976, at 7-8).

2. The documents that should have been admitted were self-explanatory, and consequently no custodial testimony was necessary to explain relevance to the jury. These documents explicitly state that the case was closed and that money posted to secure appellant's whereabouts was returned because of his August 6, 1973, deportation.

3. Because the INS is charged with the duty, inter alia, of supervising aliens and deportation proceedings, the documents in the file that reveal that INS was satisfied that appellant had departed the country are sufficiently trustworthy to allow their admissibility. Personal knowledge of the person who entered the information in the file is unnecessary. Hara v. United States, 505 F.2d 495, 497 (9th Cir. 1975); 5 Wigmore, ON EVIDENCE, §1635 (3d ed. 1940).

4. The Government's argument notwithstanding, trial counsel explicitly objected to the instruction which eradicated the probative force of Defense Exhibit C (Transcript dated January 16, 1976, at 29-30). In fact, it was counsel's objection which inspired the judge to instruct the jurors that the exhibit was

> ... neither proof that he did leave the country or he never left the country; neither proof either way.

That the judge instructed that there was no evidentiary value to the exhibit is obvious from the plain meaning of what he said, as well as from the fact that, in his charge to the jury, Judge Costantino further instructed that Ms. McAllen's tes-

timony was the only evidence** upon which the alibi defense relied.

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief for appellant, the judgment of the District Court must be reversed and the case remanded for a new trial.

Respectfully submitted,

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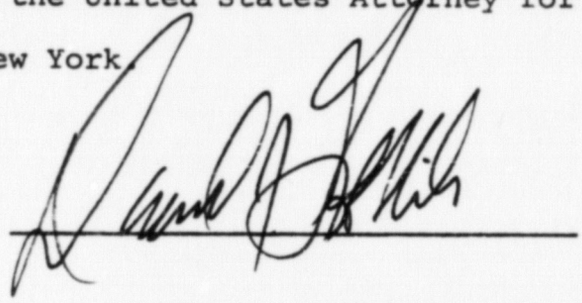
**The Government's contention that the limiting instruction did not offend the probative value of the evidence is particularly lame in light of the prosecutor's summation, which argued that the record was devoid of any support for Ms. McAllen's testimony.

I certify that a copy of this reply brief has been delivered by messenger to the United States Attorney for the Eastern District of New York.



New York, New York
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